IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1004

CASTLEWOOD INTERNATIONAL CORPORATION,

Petitioner,

v.

DISTILLED SPIRITS COUNCIL
OF THE UNITED STATES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on October 22, 1976, entitled *Castlewood International Corporation, Inc. versus Distilled Spirits Council of the United States, Inc.*

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is unreported and is printed at Appendix A. The judgment of the District Court for the District of Columbia is printed at Appendix B. The journal entry of judgment of the District Court for the District of Columbia is printed at Appendix C.

JURISDICTION

The petition seeks review of the judgment of the United States Court of Appeals for the District of Columbia Circuit dated and entered October 22, 1976. There has been no order in regard to rehearing, nor extension of time for the filing of this petition. Review by certiorari is sought pursuant to 28 U.S.C. § 1254(1) (1966).

QUESTION PRESENTED

Whether the Court of Appeals erred by affirming the District Court's order granting summary judgment in favor of the defendant in contravention of the prior decisions of the Supreme Court which strongly disfavor the allowance of summary judgment in antitrust cases where the facts showed consciously parallel action and raised questions of intent and credibility for the trier of fact.

STATUTES INVOLVED

This case involves the Sherman Antitrust Act Sections 1-3, 15 U.S.C. Sections 1-3, vol. 3 U.S.C. 2978-2979 (1970 ed., 1971); and the Federal Alcohol Administration Act, section 5, 27 U.S.C. Section 205, vol. U.S.C. . These statutes are set out in Appendix D hereto.

STATEMENT OF CASE

The Petitioner herein, Castlewood International Corporation (Castlewood), brought suit against two trade associations, Distilled Spirits Council of the United States, Inc. (DISCUS) and National Association of Alcoholic Beverage Importers, Inc., alleging antitrust violations and interference with business relationships. Jurisdiction in the court of first instance, the United States District Court for the District of Columbia, was founded upon Section 4 of the Clayton Act, 15 U.S.C. § 15 (1973), upon 28 U.S.C. §§ 1331, 1332 (1966), and upon 28 U.S.C. § 1337 (1976).

The District Court granted DISCUS' motion for summary judgment without opinion, and the Court of Appeals affirmed the order of the District Court with a terse paragraph stating that no genuine issues for trial had been shown by Castlewood.

Castlewood owns and operates some 140 cocktail lounges and package liquor stores in Florida and California. There is a substantial flow of the products Castlewood buys and sells in interstate commerce. Advertising and market development are of vital importance to Castlewood's retail operations in order to obtain and retain customers.

In July of 1973, Castlewood began to organize a trade show or exposition to be known as Big Daddy's International Wine Expo and Tasting to be held at the Miami Beach, Florida, Convention Hall on March 22-24, 1974. Manufacturers, wholesalers, and distributors of wines and similar products were invited to purchase exhibition space at $550 per booth, a price determined by costs, a reasonable profit, and comparable trade or market development activities of others. Space was available to all interested persons and companies, and Castlewood incurred substan-

tial costs in organizing the exposition. In response to the invitations, Castlewood received thousands of dollars in commitments and payments for booths from industry members, including members of the defendant trade associations.

However, on October 25, 1973, DISCUS issued a memorandum to its members on the subject of the Castlewood exposition which stated:

> It is not our intention to interfere with the commercial relationships of our members, but we have learned that this corporation has been advised by BATF, [Bureau of Alcohol, Tobacco, and Firearms], both orally and by letter, that this Expo has in it the possible proscribed elements of inducement and exclusion under Section 5, Federal Alcohol Administration Act and that any participation by manufacturers, wholesalers or distributors could possibly place their basic permits in jeopardy.
>
> This activity is also in conflict with the DISCUS Code of Good Practice. Sec. II, Contributions to Wholesalers or Retailers Functions, provides in part:
>
> "No member of the Distilled Spirits Council of the United States, Inc., directly or indirectly, shall contribute anything of value in furtherance of any exhibit, show, exposition, convention, banquet, dinner, outing, cruise or similar affair, conducted by or on behalf of any association of wholesaler or retail liquor dealers; . . ."
>
> It may be that, because of the foregoing information, you may wish to review your company's participation.

On November 12, 1973, the defendant National Association of Alcoholic Beverage Importers, Inc. relayed to its members the quoted language of the DISCUS letter.

Subsequently, participants withdrew from Castlewood's exposition, and Castlewood lost over $50,000 in lost costs and anticipated profits, and was handicapped in its ability to compete, losing a business opportunity. Castlewood and the public lost a marketing opportunity, and the competition which would have been fostered by participation of manufacturers, wholesalers, and distributors in the exposition was lost.

In regard to the defendants' reference to the BATF warnings, the actual statement from BATF, by letter of August 29, 1973, was:

> The Federal Alcohol Administration Act proscribes wholesalers, manufacturers, and distributors from, directly or indirectly, engaging in certain activities or trade practices if they result in the exclusion in whole or in part of products sold or offered for sale in interstate or foreign commerce. Although the activities outlined in your letter are not on their face violations of the Act, they would certainly be closely scrutinized by this Bureau.
>
> Any wholesaler, manufacturer, or distributor participating in your exposition would, in our opinion, be placing his permit in jeopardy because such activities would likely result in the proscribed elements of inducement and exclusion.

The position of BATF was clarified by the Treasury Department in an advisory opinion of January 4, 1974, stating:

In our opinion, the activities described in these letters would not on their face constitute violations of the Act. However, the possibility that such consequences may ensue cannot entirely be ignored. The Bureau of Alcohol, Tobacco and Firearms, in carrying out its statutory responsibilities, may monitor the exposition and subsequent events to determine whether violations occur. Any wholesaler, manufacturer, or distributor participating in your exposition should be on notice that if the events that actually occur result in the proscribed elements of inducement and exclusion under 19 U.S.C.A. 205, appropriate action will be taken.

REASONS FOR GRANTING THE WRIT

Both the District Court and the Court of Appeals below in the present case have decided a federal question in a way in conflict with applicable decisions of the Supreme Court. The case turns upon the intent of DISCUS in formulating its rule against member participation in trade shows conducted by associations of wholesale or retail liquor dealers, and upon the meaning of the documents at issue herein.

This Court set a stringent standard for granting summary judgment in antitrust cases in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), stating:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

368 U.S. at 473.

The *Poller* standard has been subsequently re-endorsed by this Court. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500 (1969); *White Motor Co. v. United States*, 372 U.S. 253, 259 (1963). Notwithstanding the clear standard stated and adhered to by Supreme Court decisions, the courts below in the instant case have granted and affirmed summary judgment where the heart of the case goes to the intent of DISCUS in adopting its rule on trade shows, to the intent of the defendants in circulating that rule at the time they did so, and to the motive of the nonparticipants in the Castlewood trade show.

The evidence herein shows that members of the defendant organizations withdrew from the Castlewood exposition after receiving memoranda from their trade associations which suggested to the members that "you may wish to review your company's participation." (DISCUS letter of October 25, 1973, and NAABI letter of November 12, 1973). The evidence thus makes out a situation comparable to *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), in which an antitrust violation was found where one party had made a proposal to change the business practices of motion picture distributors in a particular manner. All the recipients of the proposal were aware of the identity of the other recipients. The proposed changes were instituted, and this Court held that the consciously parallel action of the defendants justified an inference of conspiracy to support a conviction for violation of the Sherman Act.

The Court of Appeals in the instant case cited *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), in support of the decision appealed from. *Cities Service* was inappropriately relied on, however. There, this Court held that *Poller* did not apply where the only fact shown was a refusal to deal. There was an utter absence of evidence beyond that sole fact in *Cities Service.* Additionally, there was a reason shown besides the alleged conspiracy which was more likely to have caused the refusal to deal than was the alleged conspiracy, in light of the fact that the defendant's interests coincided with and favored dealing with the plaintiff rather than coinciding with the interests of the alleged co-conspirators. Thus, for a plaintiff to show only a bald refusal to deal may not be enough to withstand summary judgment under *Cities Service. Poller, supra,* was distinguished and was not criticized in *Cities Service.* The present case shows refusals to deal by various companies which are members of the defendants. These refusals followed upon the heels of the defendant's letters informing members that BATF had stated that "any participation by manufacturers, wholesalers or distributors could possibly place their basic permits in jeopardy." The letter then continued on to state the DISCUS rule against participation, and suggested review of any planned participation. Such a fact situation brings the present case into line with *Poller, supra; White Motor Co., supra;* and *Fortner Enterprises, supra.* By relying upon *Cities Service,* the Court of Appeals read the *Poller* case out of the law, and this it could not do. The decisions of the Supreme Court are binding upon lower federal courts until the Supreme Court instructs otherwise. *See, e.g., Hicks v. Miranda,* 422 U.S. 332 (1975). *Poller* stands as a decision uncriticized and uneroded by this Court. Therefore, the Court of Appeals' decision affirming summary judgment on a federal question

is a decision made in conflict with the applicable decisions of the Supreme Court.

Moreover, the substantive law does not support summary judgment in favor of DISCUS. On summary judgment, inferences should not be drawn from the facts, *Bragen v. Hudson County News Co.*, 278 F.2d 615, 618 (3d Cir. 1960), particularly if conflicting inferences might be drawn; *United States v. Scenic Artists Local 829,* 27 F.R.D. 499, 501 (S.D.N.Y. 1961); *Winter Park Telephone Co. v. Southern Bell Telephone & Telegraph Co.*, 181 F.2d 341 (5th Cir. 1950).

If any inferences are drawn, they must be resolved against the moving party. *Continental Casualty Co. v. Beelar,* 132 U.S. App. D.C. 1, 405 F.2d 377 (D.C. Cir. 1968); *Semaan v. Mumford,* 118 U.S. App. D.C. 282, 335 F.2d 704 (D.C. Cir. 1964).

DISCUS has asserted that it was governmental action, by BATF, that caused non-participation in the trade exposition. This position is untenable here because it entails drawing an inference from the facts and resolving it in favor of the movant rather than in favor of the opponent of summary judgment. The BATF opinion and the DISCUS rule against participation in trade shows were circulated by DISCUS in one memorandum. Only a trier of fact may draw inferences as to which spectre raised by DISCUS resulted in the non-participation. Also, only a trier of fact may determine DISCUS' intent in adopting its rule and in circulating the memorandum of October 25, 1973.

The reference to the BATF opinion should not preclude the possibility that a trier of fact might find that the non-participation resulted from the DISCUS rule. The BATF letter was based on the Federal Alcohol Administration Act,

27 *U.S.C.* § 201 *et seq.* The section of that Act at issue is Section 205 wherein certain practices, inducements, exclusions, commercial briberies, etc., are prohibited. Section 205 mentions neither trade shows nor participation in them. Further, BATF indicated that mere participation in the show would not violate section 205. A violation would occur only if a manufacturer or distributor participated in the trade show *and also committed* an affirmative act prohibited by Section 205 (BATF letter of August 29, 1973, and Department of Treasury letter of January 4, 1974).

Given the strict regulation of the liquor industry, it cannot be presumed that DISCUS members did not know what affirmative acts would violate section 205. They must have known that they could have participated in the trade show without losing their permits simply by refraining from the commission of any of the clearly delineated acts set forth in Section 205. The contention by DISCUS that its members boycotted the trade show because of the BATF letter would seem to require a finding that the members intended to use the trade show only as a cover for committing illegal acts under Section 205, and that they would thus have no reason for participating once it was clear that the BATF would monitor the show. In short, the argument of DISCUS on this issue either impugns the honesty of its members or is logically indefensible.

However, violation of the DISCUS Code would arise by mere participation and is backed up by the possibility of expulsion from the trade association. A member would be in violation of the DISCUS Code without engaging in any acts prohibited by Section 205.

If the trier of fact finds that the DISCUS Code was the cause of the nonparticipation, then a cause of action for a group boycott would be made out. Group boycotts are

proscribed by the antitrust laws. *United States v. General Motors,* 384 U.S. 127 (1966). They are proscribed when they result from the by-laws or rules of business trade associations, *Associated Press v. United States,* 326 U.S. 1 (1945); *Eastern States Retail Lumber Dealers' Association v. United States,* 234 U.S. 600 (1914); *Standard Sanitary Manufacturing Co. v. United States,* 226 U.S. 20 (1912). A case similar in principle to the present case is *Oregon Restaurant & Beverage Association v. United States,* 429 F.2d 516 (9th Cir. 1970). The case involved the sale by wholesalers of beer to the public "off the dock." Under Oregon law, some such sales were legal and others illegal. The wholesalers were told by the defendant tavern operators to cease making "off the dock" sales to the public or they would lose the tavern operator's business. No distinction was made between the legal and illegal sales, but the court held that:

> [S]ince it was their intent to stop all "off the dock" selling, their conduct was violative (of Sec. 1 of the Sherman Act) notwithstanding the fact that some of the sales were illegal.

429 F.2d at 517. Similarly, here the DISCUS Code seeks to stop all participation in Castlewood's trade show, and not merely to prevent activities prohibited by 27 *U.S.C.* § 205.

In the proceedings below, DISCUS has pointed to *Deeson v. Professional Golfer's Association of America,* 358 F.2d 165 (9th Cir.), *cert. denied,* 385 U.S. 846 (1966); *Molinas v. National Basketball Association,* 190 F. Supp. 241 (S.D. N.Y. 1961); *United States v. United States Trotting Association,* 1960 Trade Cas. ¶69,761 (S.D. Ohio 1960); and *Ruddy Brook Clothes v. British & Foreign Marine Insurance Co.,* 195 F.2d 86 (7th Cir.), *cert. denied,*

344 U.S. 816 (1952), as showing that the DISCUS Rule and memorandum are not within the scope of group boycotts. However, in *United States Trotting Association*, the defendant prevailed because no boycott was shown. *Deeson* and *Molinas* involved regulation of professional sports which the courts there found reasonable. More specifically, these cases involved association actions directed at a specified member, after a committee assessed the plaintiff's performance in *Deeson* and where the plaintiff had admitted improper conduct in *Molinas*. *Ruddy Brook Clothes* did involve a boycott by insurance companies of the plaintiff who was the subject of a report circulated among the defendants. However, the court found that denial of insurance to one individual had no appreciable effect upon interstate commerce, and that it was reasonable to attempt to exclude poor risks from coverage; indeed, it was an obligation owed to the companies' policyholders. These cases dealing with trade association actions vis-a-vis a single individual are irrelevant here where a rule of general application is challenged. The distinction is well illustrated by *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (1971), where a player eligibility rule was struck down because it provided for an absolute boycott of certain atheletes without any provision for a hearing or consideration of individual cases. On this ground the court distinguished *Deeson, supra,* and instead followed another Ninth Circuit decision, *Washington State Bowling Proprietors Association v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir.), *cert. denied,* 384 U.S. 963 (1966), which struck down an association rule as constituting a group boycott in violation of the antitrust laws.

Similar to *Denver Rockets* and *Washington State Bowling Proprietors,* in the instant case, DISCUS has propounded a rule of general application, with neither a hearing provision

nor any opportunity for an individual sponsoring a trade show to present the merits of his show for consideration. This blanket prohibition constitutes an actionable group boycott which infringes upon competition by inhibiting DISCUS members from exercising their First Amendment right to advertise. This Court has recently recognized the extreme importance of advertisement to both the businessman and to the consumer. *Virginia State Board of Pharmacy v. Virgina Citizens Consumer Council,* 423 U.S. 815 (1976); *Bigelow v. Virginia,* 421 U.S. 809 (1975). While these cases are not directly applicable, they do show judicial recognition of the crucial role of commercial speech to both the businessman and consumer.

Trade shows, like Castlewood's exposition, by providing a forum for wine tasting, stimulate competition in the industry by exposing consumers to a variety of wines which otherwise the consumer might not be exposed to because he would not buy an entire bottle of an unknown wine merely to conduct his own taste test. In *United States v. Western Winter Sports Representative Association, Inc.*, 1962 Trade Cas. ¶ 70,418 (N.D. Cal. 1962), the court held that the complaint stated a claim for relief under Section 1 of the Sherman Act and entered a consent decree enjoining and restraining the defendant trade association from, *inter alia:*

> (A) Prohibiting or regulating the issuance by any exhibitor of invitations to retailers to attend any trade show;
> (B) Prohibiting or restricting the attendance at any trade show of any retailers holding such an invitation in writing;

Id. at 76,683. The court further ordered the defendant,

> to rescind all of its bylaws, code of ethics, rules and regulations, which contravene or conflict in any way with the provisions of this Final Judgment.

Id.

This case presents a trade association rule which on its face presents a group boycott of trade shows. Whether the DISCUS rule or BATF position caused the damage to Castlewood's trade show is a question to be inferred from the facts by the jury. In this connection, it is important to remember that the DISCUS rule sought to preclude all participation in the trade show, regardless of the legality of such participation, while BATF's interest was restricted to any affirmative violations which might arise in the setting of the trade show, which BAFT regarded as lawful in and of itself. To the extent that DISCUS sought to impede lawful activity, it is not protected by the BATF activity. *See Oregon Restaurant & Beverage Association, supra.*

Group boycotts are illegal per se. *United States v. General Motors, supra; Klors, Inc. v. Broadway-Hale, Inc.*, 359 U.S. 207 (1959); *Fashion Originators Guild of America, Inc. v. F.T.C.*, 312 U.S. 457 (1941). Even if the rule of reason is applicable to judge this restraint on trade, the courts below did not consider evidence of the reasonableness of Section 2 of the DISCUS Code or its effect upon commerce, and in the absence of such consideration, the allowance of summary judgment was erroneous.

With the DISCUS rule constituting an unlawful group boycott on its face, the determination of whether there was a conspiracy or combination in restraint of trade causing damage to Castlewood is for the jury, based on such factors in this case as the rule itself, the circulation of that rule by

memorandum with the statement that the rule applied to the Castlewood exposition, and the effect of the statements relating to BAFT. These factors may support a finding of conspiracy, *Interstate Circuit, Inc., supra.* They are essentially questions of motive and intent, and credibility of witnesses, questions properly for the jury and not for the Court on summary judgment. *Poller, supra.*

Thus, the lower courts erroneously granted and affirmed summary judgment in this case. In doing so the courts decided a federal question in a way in conflict with applicable decisions of the Supreme Court, most particularly, the *Poller* case and its progeny.

CONCLUSION

Because the lower federal courts have granted summary judgment in a manner in conflict with the decisions of this Court, this petition for a writ of certiorari should be granted, and on review of the decision below, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

Carl L. Shipley
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1016 — September Term, 1976
Castlewood International Corporation, a Florida Corporation, Appellant — CIVIL 74-641
v.
Distilled Spirits Council of the United States, Inc, a New York Corporation, et al

No. 76-1190
Castlewood International Corporation, a Florida Corporation, Appellant
v.
Distilled Spirits Council of the United States, Inc., a New York Corporation, et al

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, Chief Judge, TAMM and ROBB, Circuit Judges

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these causes are hereby affirmed.

The appellant set forth no facts showing there was a genuine issue for trial. *Fed. R. Civ. P.* 56(e); *Dewey v. Clark*, 86 U.S. App. D.C. 143, 180 F.2d 766 (1950); *Thompson v. Evening Star Newspaper Co.*, 129 U.S. App. D.C. 299, 394 F.2d 774, *cert. denied*, 393 U.S. 884 (1968); *First National Bank v. Citics Service Co.*, 391 U.S. 253, 289-90 (1968).

The cost of the depositions used in support of the motion for summary judgment and the cost of copies of papers obtained for use in the case were properly taxed to the appellant.

Per Curiam
For the Court

/s/ George A. Fisher
George A. Fisher, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Nov 4, 1975]

CASTLEWOOD INTERNATIONAL CORPORATION,
Plaintiff,
v.
DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.
and
NATIONAL ASSOCIATION OF ALCOHOLIC BEVERAGE IMPORTERS, INC.
Defendants.

Civil Action No. 74-641

ORDER

Upon consideration of defendant Distilled Spirits Council of the United States, Inc.'s Motion to Dismiss or in the Alternative for Summary Judgment, with a Memorandum of Points and Authorities in Support of such Motion, and plaintiff's opposition to such Motion,

IT IS HEREBY ORDERED that Summary Judgment be, and hereby is, granted for the defendant Distilled Spirits Council of the United States, Inc.

Dated this 3rd day of November, 1975.

/s/ William B. Bryant
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CASTLEWOOD INTERNATIONAL CORPORATION,
Plaintiff,

v. Civil Action No. 74-560

SECRETARY OF THE TREASURY,
Defendant.

[Dated July 17, 1974]

MEMORANDUM AND ORDER

This is an action for declaratory judgment and comes before the court on defendant's motion to dismiss, or, in the alternative, for summary judgment.

Plaintiff, an alcoholic beverage retailer, wrote to the Bureau of Alcohol, Tobacco, and Firearms, an agency of the Treasury Department, seeking advice as to whether a proposed "wine exposition," to be conducted by plaintiff in Miami during March of 1974, would violate the Federal Alcohol Administration Act or any other Federal statute. The agency staff replied on August 29, 1973, that the proposed activities "are not on their face violations of the Act," but that they "would likely result in the proscribed elements of inducement and exclusion." Because of this danger, the staff warned that it would closely scrutinize the exposition and that anyone participating in it would "be placing his permit in jeopardy." When plaintiff sought clarification of this letter from the Treasury Department, Deputy Assistant Secretary Brent F. Moody replied on January 4, 1974, that the proposed exposition appeared to be legal as described,

but added that it would be scrutinized and suggested that participants should be warned that violations of the law would result in "appropriate action" by the Government.

Although the March exposition had already fallen through, plaintiff brought this action seeking a declaratory judgment holding that defendant's actions as reflected by the correspondence were unlawful, arbitrary and capricious and that the wine exposition "as proposed by plaintiff for March 22-24, 1974, and in the future would not place their permits in jeopardy." Thus, plaintiff evidently still wishes to assure potential participants that contemplated future expositions will not involve participants in legal difficulties.

Defendant contends that its letters did not constitute final agency action under 5 U.S.C. § 704 and are consequently not reviewable by the courts. This position is well founded. The staff letter of August 29, 1973, constituted an informal advisory opinion of an agency staff, and is not subject to judicial review. *Kixmiller v. S.E.C.*, 492 F.2d 641 (D.C. Cir. 1974). The Court need not reach the question of whether or not the Assistant Secretary had the authority to issue definitive, binding orders subject to challenge in the courts, because it is clear that his letter of January 4, 1974, like the staff letter before it, did not even purport to be such a document. Far from informing plaintiff that its proposed activities would violate the law, it stated that the proposal appeared legal on its face, and merely warned that such violations as did in fact arise would prompt agency action. Such vague language concerning a hypothetical future exposition lacks the finality, formality and clarity necessary to render agency determinations ripe for judicial review. *Medical Comm. for Human Rights v. S.E.C.*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972); *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d

689 (D.C. Cir. 1971). Nor will the Court render an advisory opinion as to the legality of the proposed exposition apart from the agency's actions, for the controversy between these parties is neither sufficiently concrete nor sufficiently adverse at this time to warrant judicial resolution. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937); *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

It is therefore

ORDERED that defendant's motion to dismiss is granted.

/s/ Gerhard A. Gessell
UNITED STATES DISTRICT JUDGE

July 17, 1974.

APPENDIX D

15 U.S.C. Sections 1 - 3

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restrain of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engaged in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by

fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 1, 26 Stat. 209; August 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c.281, 69 Stat. 282.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 3. Trusts in Territories or District of Columbia illegal; combination a misdemeanor

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand

dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c.647, § 3, Stat. 209; July 7, 1955, c.281, 60 Stat. 282.

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27 U.S.C. 205

§ 205. Unfair competition and unlawful practices

It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, or distilled spirits, directly or indirectly or through an affiliate:

(a) Exclusive outlet. To require, by agreement or otherwise, that as retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or

(b) "Tied house". To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent

transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: (1) By acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (2) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; or (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money services, or other thing of value, subject to such exceptions as the Secretary of the Treasury shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection; or (4) by paying or crediting the retailer for any advertising, display, or distribution service; or (5) by guaranteeing any loan or the repayment of any financial obligation of the retailer; or (6) by extending to the retailer credit for a period in excess of the credit period usual and customary to the industry for the particular class of transactions, as ascertained by the Secretary of the Treasury and prescribed by regulations by him; or (7) by requiring the retailer to take and dispose of a certain quota of any of such products; or

(c) Commercial bribery. To induce through any of the following means, any trade buyer engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign

commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such trade buyer in interstate or foreign commerce: (1) By commercial bribery; or (2) by offering or giving any bonus, premium, or compensation to any officer, or employee, or representative of the trade buyer; or

(d) Consignment sales. To sell, offer for sale, or contract to sell to any trade buyer engaged in the sale of distilled spirits, wine, or malt beverages, or for any such trade buyer to purchase, offer to purchase, or contract to purchase, any such products on consignment or under conditional sale or with the privilege of return or on any basis otherwise than a bona fide sale, or where any part of such transaction involves, directly or indirectly, the acquisition by such person from the trade buyer or his agreement to acquire from the trade buyer other distilled spirits, wine, or malt beverages – if such sale, purchase, offer, or contract is made in the course of interstate or foreign commerce, or if such person or trade buyer engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such sale, purchase, offer, or contract is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such trade buyer in interstate or foreign commerce: *Provided,* That this subsection shall not apply to transactions involving solely the bona fide return of merchandise for ordinary and usual commercial reasons arising after the merchandise has been sold; or

(e) Labeling. To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles, unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container (1) as will prohibit deception of the consumer with respect to such products or the quantity thereof and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law and except that, in the case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of the package, and the manufacturer or bottler or importer of the product; (3) as will require an accurate statement in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or in case of neutral spirits or of gin produced by a process of continuous

distillation, the name of the commodity from which distilled; (4) as will prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene, or indecent; and (5) as will prevent deception of the consumer by use of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, and as will prevent the use of a graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been indorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization: *Provided*, That this clause shall not apply to the use of the name of any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer, wholesaler, retailer, bottler, or warehouseman, of distilled spirits, wine, or malt beverages, nor to the use by any person of a trade or brand name used by him or his predecessor in interest prior to August 19, 1935; including regulations requiring, at time of release from customs custody, certificates issued by foreign governments covering origin, age, and identity of imported products: *Provided further*, That nothing herein nor any decision, ruling, or regulation of any Department of the Government shall deny the right of any person to use any trade name or brand of foreign origin not presently effectively registered in the United States Patent Office which has been used by such person or predecessors in the United States for a period of at least five years last past, if the use of such name or brand is qualified by the name of the locality in the United States in which the product is produced, and, in the case of the

use of such name or brand on any label or in any advertisement, if such qualification is as conspicuous as such name or brand.

It shall be unlawful for any person to alter, mutilate, destroy, obliterate, or remove any mark, brand, or label upon distilled spirits, wine, or malt beverages held for sale in interstate or foreign commerce or after shipment therein, except as authorized by Federal law or except pursuant to regulations of the Secretary of the Treasury authorizing relabeling for purposes of compliance with the requirements of this subsection or of State law.

In order to prevent the sale or shipment or other introduction of distilled spirits, wine, or malt beverages in interstate or foreign commerce, if bottled, packaged, or labeled in violation of the requirements of this subsection, (1) no bottler of distilled spirits, no producer, blender, or wholesaler of wine, or proprietor of a bonded wine storeroom, and no brewer or wholesaler of malt beverages shall bottle, and (2) no person shall remove from customs custody, in bottles, for sale or any other commercial purpose, distilled spirits, wine, or malt beverages, respectively, after such date as the Secretary of the Treasury fixes as the earliest practicable date for the application of the provisions of this subsection to any class of such persons (but not later than August 15, 1936, in the case of distilled spirits, and December 15, 1936, in the case of wine and malt beverages, and only after thirty days' public notice), unless, upon application to the Secretary of the Treasury, he has obtained and has in his possession a certificate of label approval covering the distilled spirits, wine, or malt beverages, issued by the Secretary in such manner and form as he shall by regulations prescribe: *Provided*, That any such bottler of distilled spirits, or producer, blender, or wholesaler of wine,

or proprietor of a bonded wine storeroom, or brewer or wholesaler of malt beverages shall be exempt from the requirements of this subsection if, upon application to the Secretary, he shows to the satisfaction of the Secretary that the distilled spirits, wine, or malt beverages to be bottled by the applicant, are not to be sold, or offered for sale, or shipped or delivered for shipment, or otherwise introduced, in interstate or foreign commerce. Officers of internal revenue are authorized and directed to withhold the release of distilled spirits from the bottling plant unless such certificates have been obtained, or unless the application of the bottler for exemption has been granted by the Secretary; and customs officers are authorized and directed to withhold the release from customs custody of distilled spirits, wine, and malt beverages, unless such certificates have been obtained. The District Courts of the United States, and the United States court for any Territory shall have jurisdiction of suits to enjoin, annul, or suspend in whole or in part any final action by the Secretary upon any application under this subsection; or

(f) **Advertising.** To publish or disseminate or cause to be published or disseminated by radio broadcast, or in any newspaper, periodical or other publication or by any sign or outdoor advertisement or any other printed or graphic matter, any advertisement of distilled spirits, wine, or malt beverages, if such advertisement is in, or is calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail, unless such advertisement is in conformity with such regulations, to be prescribed by the Secretary of the Treasury, (1) as will prevent deception of the consumer with respect to the products advertised and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guaranties, and scientific or irrelevant matters as the Secretary of the Treasury

finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised, the alcoholic content thereof (except the statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited), and the person responsible for the advertisement; (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by lending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or in case of neutral spirits or of gin produced by a process of continuous distillation, the name of the commodity from which distilled; (4) as will prohibit statements that are disparaging of a competitor's products or are false, misleading, obscene, or indecent; (5) as will prevent statements inconsistent with any statement on the labeling of the products advertised. This subsection shall not apply to outdoor advertising in place on June 18, 1935, but shall apply upon replacement, restoration, or renovation of any such advertising. The prohibitions of this subsection and regulations thereunder shall not apply to the publisher of any newspaper, periodical, or other publication, or radio broadcaster, unless such publisher or radio broadcaster is engaged in business as a distiller, brewer, rectifier, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate.

The provisions of subsections (a), (b), and (c) of this section shall not apply to any act done by an agency of a State or political subdivision thereof, or by any officer or employee of such agency.

In the case of malt beverages, the provisions of subsections (a), (b), (c), and (d) of this section shall apply to transactions between a retailer or trade buyer in any State and a brewer, importer, or wholesaler of malt beverages outside such State only to the extent that the law of such State imposes similar requirements with respect to similar transactions between a retailer or trade buyer in such State and a brewer, importer, or wholesaler of malt beverages in such State, as the case may be. In the case of malt beverages, the provisions of this subsection and subsection (3) of this section shall apply to the labeling of malt beverages so sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, or the advertising of malt beverages intended to be sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, only to the extent that the law of such State imposes similar requirements with respect to the labeling or advertising, as the case may be, of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received in such State from any place outside thereof.

The Secretary of the Treasury shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations to carry out the provisions of this section. (Aug. 29, 1935, c. 814, § 5, 49 Stat. 981; Feb. 29, 1936, c. 105, § 2, 49 Stat. 1152; June 25, 1936, c. 804, 49 Stat. 1921; June 26, 1936, c. 830, Title V, §§ 505, 506, 49 Stat. 1965, 1966; Reorg. Plan No. III, § 2, eff. June 30, 1940, 5 Fed.Reg. 2108, 54 Stat. 1232; Apr. 20, 1942, c. 244, § 1(h), 56 Stat. 219.)